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IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

ASTOL CALERO-TOLEDO, Superintendent of Police,
EDGAR R. BALZAC, Administrator of the General
Services Administration of the Commonwealth of
Puerto Rico, *Appellants*,

v.

PEARSON YACHT LEASING Co., *Appellee*

On Appeal from the United States District Court for the
District of Puerto Rico

APPELLANTS' BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-157

ASTOL CALERO-TOLEDO, Superintendent of Police,
EDGAR R. BALZAC, Administrator of the General
Services Administration of the Commonwealth of
Puerto Rico, *Appellants*,

v.

PEARSON YACHT LEASING Co., *Appellee*

On Appeal from the United States District Court for the
District of Puerto Rico

APPELLANTS' BRIEF

OPINION BELOW

This is an appeal from the judgment of the United States District Court for the District of Puerto Rico, sitting as a three-judge court, entered on March 29, 1973. The opinion of the court below is not yet re-

ported. A copy of the memorandum opinion and order is attached to the jurisdictional statement as Appendix A¹ thereto, p. 19.

JURISDICTION

This suit was brought by Appellee Pearson Yacht Leasing Co. ("Pearson") under 28 U.S.C. §1343 to redress alleged deprivation of Pearson's rights under the Fifth and Fourteenth Amendments. Defendants-Appellants are the current Superintendent of Police and the Administrator of the General Services Administration of the Commonwealth of Puerto Rico (hereinafter collectively referred to as "the Commonwealth"). A three-judge court was convened pursuant to 28 U.S.C. § 2281. This Court has never passed on the applicability of 28 U.S.C. § 2281 to the Commonwealth of Puerto Rico. But district courts have taken Puerto Rico to be a "state" within contemplation of § 2281 ever since shortly after it became a commonwealth. *Mora v. Meijas*, 115 F.Supp. 610 (D.P.R. 1953); *Wackenhut Corp. v. Aponte*, 266 F.Supp. 401 (D.P.R. 1966). See also *Mora v. Meijas*, 206 F.2d 550 (1st Cir. 1953), and *Americana of Puerto Rico, Inc. v. R. Kaplas*, 368 F.2d 431 (3rd Cir. 1966). The judgment of the District Court was entered on March 29, 1973, and notice of appeal was filed in that court on May 8, 1973. Assuming that the three-judge court was properly called, the jurisdiction of the

¹ In this brief, parts of the record previously printed as appendices to Appellants' jurisdictional statement will be cited "Jrsd. Stat., App. A, p. 19". Inasmuch as the filing of briefs in this case is being accelerated pursuant to the Clerk's request, and the appendix is to be filed after Appellant's brief, citations to the appendix will be to certified record pagination and follow the designation "R".

Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253. *Pa. Public Util. Comm'n v. Pa. R.R. Co.*, 382 U.S. 281 (1965); *Stainback v. Wo Hock Ke Lok Po*, 336 U.S. 376 (1949); *Rorick v. Bd. of Comm'rs of Everglades Drainage Dist.*, 307 U.S. 208 (1939). This Court noted probable jurisdiction on October 9, 1973.

STATUTES INVOLVED

The pertinent parts of 24 L.P.R.A. §2512 (a)(4) and (b) (Supp. 1972), 34 L.P.R.A. §1722 (a)-(e), and 23 L.P.R.A. §451, 451b, and 451c are set forth in Appendix I hereto.

QUESTIONS PRESENTED

1. Whether Pearson, nominally lessor but effectively conditional vendor of a yacht seized by and forfeited to the Commonwealth, had such a property interest in the yacht as would support a claim of deprivation of property without due process of law and taking without just compensation.

2. Whether certain confiscation and forfeiture statutes of the Commonwealth, in authorizing seizure of property without notice and prior adversary hearing, deny persons with interests therein due process of law.

3. Whether these statutes must be construed as authorizing the taking without just compensation of Pearson's property, to wit, by denying owners and lienholders who have consented to the use by others of the property seized the right to challenge the forfeiture on the grounds of their own innocence in the wrong for which the property is seized and forfeited, and if so, whether such statutes are constitutional.

STATEMENT ²

Pearson is a New York incorporated and based division of Grumman, Inc., engaged in leasing pleasure yachts. On March 15, 1971, Pearson leased a yacht to Donovan and Loretta Olson ("Lessee") for a five-year term.³ The parties simultaneously executed an option contract giving Lessee the right to purchase the yacht on thirty days' notice at any time during the lease term, the option price diminishing over that period at a depreciation rate equivalent to the monthly rental. At the end of the fifth year the yacht could be purchased for \$1.00. Jrtd. Stat., App. C, pp. 53-54. In effect, then, Pearson sold the yacht to its "lessee", retaining title until it had received full payment.

On May 6, 1972, Puerto Rican authorities discovered marihuana on the yacht. Under the Controlled Substances Act of Puerto Rico, 24 L.P.R.A. § 2102-2607 (Supp. 1972), App. I, *infra*, p. 1a, posses-

² The factual record on which this appeal is based consists of a Stipulation of Facts and the lease and option-to-purchase agreements between Pearson and Lessee, all of which was printed as Appendix C to the Commonwealth's jurisdictional statement at p. 37.

³ The lease agreement provided that Lessee was to use the yacht only for legal purposes; that Lessee, at its expense, was to insure Pearson against loss of the yacht "sustained in any manner whatsoever"; that "forfeiture" of said Equipment shall not discharge or diminish the obligation of Lessee to pay rent . . . " [emphasis supplied]; that Lessee had the exclusive right to use and possession of the Yacht during the term unless and until default by Lessee, written notice of default by Pearson, expiration of a fifteen-day correction period, and exercise by Pearson of its right to terminate; and finally, that the yacht was to be based at the contract date home port of Lessee, specified as a Puerto Rican address, except with the written consent of Pearson. Jrtd. Stat., App. C, pp. 42-50.

sion of marihuana is prohibited. It was stipulated at trial that Pearson was wholly innocent of this violation of law. On July 11, 1972, the yacht was seized by the Superintendent of Police, predecessor in office of appellant Astol Calero-Toledo. 24 L.P.R.A. § 2512 (a)(4) (Supp. 1972) subjects to forfeiture to the Commonwealth of Puerto Rico vessels used to transport controlled substances. Under § 2512(b) such property is to be seized and forfeited in the manner provided by the Uniform Vehicle, Mount, Vessel and Plane Seizure Act, 34 L.P.R.A. § 1722 b. App. I, *infra*, p. 1a.

Section 1722 requires the Superintendent to serve notice of the seizure "on the owner of the property seized or the person in charge thereof or any person having any known right or interested [sic] therein" within ten days. The Superintendent duly notified Lessee, who was on record with the Division of Marine Operations of the Ports Authority as the owner of the vessel. 23 L.P.R.A. § 451b and 451c require the owner of the vessel who wishes to operate it within the navigable waters of Puerto Rico to file an application for an identification number with the Authority. Neither the Superintendent nor Lessee notified Pearson, who was not on record with the Ports Authority. Jrstd. Stat., App. B, pp. 33, 34, 36; App. C, p. 39.

Lessee failed to challenge the confiscation within the fifteen-day period following service of notice on him as provided by §1722(a); under § 1722(c), the yacht then became subject to sale at auction or reservation for official use of the Government of Puerto Rico. The Chief of the Office of Transportation, predecessor in office of Edgar R. Balzac, second-named appellant, has retained the vessel pending outcome of this appeal. Pearson did not learn of the seizure until Lessee de-

faulted and Pearson unsuccessfully attempted, on October 19, 1972, to regain possession of the yacht. Jrtd. Stat., App. A, p. 22.

On November 6, 1972, Pearson filed suit in the United States District Court for the District of Puerto Rico under 28 U.S.C. § 1343, seeking to compel the return of the yacht, to have 24 L.P.R.A. §2512 (a)(4) and (b) and 34 L.P.R.A. § 1722 declared unconstitutional, and to enjoin their enforcement. R.8. Pearson also filed a motion to have a three-judge court convened in accordance with 28 U.S.C. § 2281. R.22. On December 21, the Commonwealth withdrew its opposition (on the basis of the abstention doctrine) to the convening of the three-judge court, and submitted thereto. R.40, Jrtd. Stat., App. A, p. 20.

In its memorandum opinion and order issued March 29, 1973, the three-judge court, in effect, ordered the Commonwealth to pay Pearson the appraised value of the yacht, as provided under 34 L.P.R.A. § 1722(d), and issued a permanent injunction against the enforcement of the challenged statutory provisions. The order was based on two holdings. First, the court declared that the challenged statute, in authorizing seizure without prior notice and hearing, permitted a deprivation of Pearson's property without due process, and was, therefore, "on its face unconstitutional." Jrtd. App. A, p. 27. The court claimed support for this proposition in *Fuentes v. Shevin*, 407 U.S. 67 (1972). (The court did *not* hold that the Commonwealth had failed to make reasonable efforts to notify interested parties before the *forfeiture*, specifically indicating that had this issue been reached it would have been decided in favor of the Commonwealth. Jrtd. Stat., App. A, p. 26). Second, the

court held that the statutes effected a taking of Pearson's property without just compensation in that, as the court read the Supreme Court of Puerto Rico's construction of the statutes, they do not allow the owner of seized property to nullify a forfeiture by proving his own innocence in the crime for which the property was seized. *United States v. United States Coin and Currency*, 401 U.S. 715, 721-722 (1971) (hereinafter, *Coin and Currency*), was said to be controlling. The district court entered judgment on June 15, 1973, R.87, based on its March 29, 1973 memorandum opinion and order.

SUMMARY OF ARGUMENT

Forfeiture is a standard statutory prescription for property used in connection with any of a broad range of violations of criminal law. See, e.g., 21 U.S.C. § 881(a), from which the Puerto Rican statute was copied; 49 U.S.C. § 782; 26 U.S.C. § 7301; 56½ Ill. Stats. Ann. § 712, § 1505 (Supp. 1973); 18 Mich. Stats. Ann. § 18.1070 (55) (Supp. 1973); 14A Fla. Stats. Ann. § 398.24. All of these statutes and many others must fall if the decision below is affirmed. None provides notice before seizure, which the district court held due process to require; none of the cited federal statutes by its terms protects innocent owners and lienholders against forfeiture, which the district court held is necessary to avoid taking without just compensation. If this Court affirms the district court's decision without modification, it will make drafting an effective and constitutional forfeiture statute an impossibility. Obviously, notice and an adversary hearing before seizure would enable the genuinely criminal to remove and hide any property sought to be seized.

The Commonwealth regards its seizure and forfeiture statutes as being particularly important to its ability to control traffic in illegal drugs. This is especially so since most illegal drugs are smuggled into the island by plane or boat. Manifestly, the ability to obtain forfeiture of the vehicle or vessel used in connection with the commission of a crime is itself an important inducement to obedience of the drug laws; it also assists in controlling the instrumentalities of crime. The effect of the challenged statutes being on the books is that the legislature of Puerto Rico has made the determination that such statutes are required or at least are useful and convenient to the carrying out of highly important governmental functions. This determination, especially in view of the Commonwealth's peculiar status vis-a-vis the United States, must not lightly be disregarded.

The decision of the court below would require material reassessment of our understanding of the Fourth Amendment's guarantee against "unreasonable searches and seizures": if notice and an adversary hearing must be provided before property whose possessor has already been arrested can be seized, does it not follow that notice and an adversary hearing must be provided before the suspect himself can be arrested?

We respectfully submit that the decision of the court below is clearly erroneous. As concerns the seizure issue, Pearson was not deprived of any property interest by the seizure of the yacht from Lessee because it had no possessory interest whatsoever in the vessel at that moment, only a security interest, or at most bare title. But even if Pearson had standing to complain, due process has never been construed by this

Court to require an adversary hearing before *seizure*, related to a quasi-criminal proceeding such as forfeiture, and *Fuentes v Shevin*, cited by the district court as supporting that construction, expressly rejects it. Due process does require an attempt to provide appropriate notice and opportunity for hearing before *forfeiture*; but the challenged statutes make adequate provisions for this, and the district court expressed satisfaction with Puerto Rico's efforts to notify parties with interests in the yacht.

The district court found that Pearson's property was taken without "just compensation" because it would have been barred, under Puerto Rican law, from defeating the forfeiture by establishing its own innocence of the particular crime involved. This conclusion is incorrect for four reasons. First, there is a threshold question of Pearson's standing. Depending upon the proper interpretation of another part of the Puerto Rican statutes, Pearson either still has, or once had but lost by inaction, an opportunity to present its defenses to a Puerto Rican court. In neither case can Pearson be found to have suffered any loss from the constitutional infirmity it alleges. Second, this Court's statement in *Coin and Currency*, *supra*, at 721-22, that forfeiture statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise" has never been authoritatively interpreted to require legislative provision of such a defense as a condition to the constitutionality of forfeiture statutes; the weight of the expressions of lower courts is against this interpretation; and policy and precedent are against such a requirement. Third, even if the district court was correct in finding that any constitutionally sound forfeiture

statute must permit the defense, there is ample Puerto Rican precedent for recognizing it without invalidating the statutes. The court below should have followed these precedents to avoid declaring the statutes unconstitutional. Fourth, it would be grossly unjust to permit Pearson to extract from Puerto Rico the appraised value of the yacht. Pearson is already entitled, under its agreement with Lessee, to the insurance proceeds and to an action against Lessee for the balance of the rent due, each of which is presumably at least equal in value to the yacht when seized, as stipulated by Pearson itself. Moreover, whatever opportunities to contest the forfeiture Pearson did have or should have had, it lost them by its own negligent failure to register its interest in the yacht with the Puerto Rican Ports Authority as required by the laws of Puerto Rico.

ARGUMENT

I. The Court Below Erred in Holding That Seizure Without Notice Deprived Pearson of Property Without Due Process of Law.

Initially, the record establishes that Pearson suffered no injury, of a character sufficient to justify a complaint of deprivation of its property without due process, as a result of the yacht's seizure. Under Clauses 6 and 11 of the lease, Lessee, not Pearson, had the exclusive right to possession of the yacht at the time of seizure. *Jrsd. Stat., App. C, pp 45, 47.* In Puerto Rico, title to seized property does not pass until forfeiture, *Downs v. Porrato*, 76 P.R.R. 572 (1954). Therefore the court below erred when it found that Pearson "has been deprived, since [the seizure of the yacht, on] July 11, 1972 of valuable property . . ."

Jrsd. Stat., App. A, p. 21. And it is therefore impossible for the *seizure* of the yacht to have violated Pearson's rights under the due process clause.

The district court found the statute unconstitutional on its face because it made no provision for notice and a hearing before seizure. The district court cited *Fuentes v. Shevin*, 407 US 57 (1972), as prohibiting such a "deprivation", and concluded that "*forfeiture*" is not one of those extraordinary situations justifying postponing a hearing" [all emphasis supplied unless otherwise indicated]. Jrsd. Stat., App. A, p. 28. But the issue, as put by the court below, is whether *seizure* involves considerations justifying postponing a hearing; Puerto Rico, like other American jurisdictions, does provide opportunity for a hearing before *forfeiture*. The replevin statutes which were held in *Fuentes v. Shevin* to deprive without due process were described by this Court as follows:

The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. (407 U.S. at 93)

The Court then went on to say that:

The seizure of possessions under a writ of replevin is entirely different from the seizure of possessions under a search warrant. First, the search warrant is generally issued to serve a highly important governmental need—e.g., the apprehension and conviction of criminals—rather than the mere private advantage of a private party in an

economic transaction. Second, a search warrant is generally issued in situations demanding prompt action. The danger is all too obvious that a criminal will destroy or hide evidence or fruits of his crime if given any prior notice. Third, the Fourth Amendment guarantees that the state will not issue search warrants merely upon the conclusory application of a private party. It guarantees that the state will not abdicate control over the issuance of warrants and that no warrant will be issued without a showing of probable cause. *Thus, our decision today in no way implies that there must be opportunity for an adversary hearing before a search warrant is issued. (Id. at 93-94, n. 30.)*

The considerations expressed by the Court in *Fuentes v. Shevin*, as distinguishing seizure under a search warrant from seizure under a writ of replevin, apply generally to seizure in connection with a forfeiture proceeding. In Puerto Rico, seizure pursuant to the Controlled Substance Act, 24 L.P.R.A. 2512, can only apply to vehicles used in connection with the commission of a crime, where prompt action is generally necessary, and can only occur if authorized by a "high government official", i.e., "the Secretary of Justice [Attorney General], the Secretary of the Treasury or the Police Superintendent." 34 L.P.R.A. 1722(a). Thus, seizure in a forfeiture proceeding, like seizure of evidence for a criminal proceeding has been held subject to the "probable cause" requirement of the Fourth Amendment, not the adversary hearing requirement of the due process clause.⁴ *United States v.*

⁴ It would be especially absurd to require notice before seizure on the specific facts of this case: is the commonwealth to carry the burden of notifying all holders of security interests in a vessel transporting contraband before seizing it?

Troiano, 365 F.2d 416 (3rd Cir. 1966), *cert. denied* 385 U.S. 958 (1966); *Burge v. United States*, 342 F.2d 408 (9th Cir. 1965), *cert. denied* 382 U.S. 829 (1965): *cf.* 24 L.P.R. § 2510 (Supp. 1972).

The due process clause does obligate the state to make efforts "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action (in which their interests will be affected)," *Mullane v. Central Hanover Tr. Co.*, 399 U.S. 306, 314 (1950); *Robinson v. Hanrahan*, 409 U. S. 38 (1972). The challenged statute provides for such notice, 34 L.P.R.A. § 1722(a), and the court below stated that "from the record in this case, we are not disposed to rule that the Commonwealth of Puerto Rico did not have reason to believe that notice to the owner was, in fact, given." *Jrsd. Stat., App. A*, p. 26. Accordingly, the court below unquestionably erred in holding that notice and hearing are constitutional prerequisites to a lawful seizure.

II. The Court Below Erred in Holding That Pearson Suffered a Taking of Property Without Just Compensation.

Pearson alleged that the hearing Puerto Rico provides before forfeiture is not meaningful because the defense of innocence of the crime for which the vessel is forfeited is not provided by the statutes. The three-judge court treated this contention as raising the issue of taking without just compensation. As discussed below, the district court's conclusion is erroneous for a number of reasons. We observe initially, however, that analysis of the legality of forfeiture in terms of the Fifth Amendment's "just compensation" standard appears fundamentally unsound because no property is being taken "for public use" in the eminent domain

sense which is at the core of the just compensation requirement of the Fifth Amendment.⁵

Pearson Lacked Standing to Complain.

A. The constitutionality of the alleged failure of Puerto Rican law to allow the innocent third party defense in forfeiture proceedings is an issue that the district court should never even have reached. 34 L.P.R.A. § 1722(a) provides that an interested party has fifteen days in which to challenge a forfeiture if the courts are to have jurisdiction over his complaint. App. I, *infra*, p. 1a. It is well established that this period does not run against an interested party until *he himself* has been notified. *Garcia v. Superior Court*, 91 P.R.R. 146 (1964). In 1964 the Supreme Court of Puerto Rico said "we have no quarrel with the theory" of a plaintiff corporation seeking to contest a forfeiture on the grounds that notice was not properly served on it more than one year after notice had been served on its president. *Commonwealth v. Superior Court*, 96 P.R.R. 822, 824 (1969), n. 1 [translation from the Spanish text by Fernando E. Agrait-Betancourt, Assistant Secretary, Office of the Attorney General of the Commonwealth of Puerto Rico].

Pearson by its own admission had actual knowledge of seizure of the yacht by October 19, 1972, more than fifteen days before it filed its suit in federal district court. If actual notice satisfies the statutory requirements, then Pearson, like the plaintiff in *Commonwealth v. Superior Court*, *supra*, has lost its chance to air its third party defense through its own inaction.

Presumably this is the basis of the conclusion of the court below that Pearson is time-barred from the

⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

Puerto Rican courts. Jrtd. Stat., App. A, pp. 21-22. If, however, only notice according to the statutory formula will suffice, as *Garcia v. Superior Court*, *supra*, would indicate, then Pearson has not yet been notified and hence has not yet been barred from the court of Puerto Rico. On either interpretation, Pearson has suffered no damage as a result of the alleged failure of the Puerto Rican statute to satisfy the asserted just compensation standard. As Justice Brandeis said in his benchmark concurring opinion in *Ashwander v. T.V.A.*, 297 U.S. 288, 347-8 (1935):

The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

**The Commonwealth's Forfeiture Statute
Does Not Violate the Fifth Amendment
"Just Compensation" Requirement**

B. The district court reasoned that if forfeiture statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise," *Coin and Currency*, *supra*, at 721-2, it is a taking without just compensation to deny one having an interest in property seized, but lacking involvement in the crime for which the seizure was made, the right to preserve his interest against forfeiture by proof of his innocence. In support of this reasoning, the court offered one federal appellate decision and two federal district court decisions. The appellate decision, *McKeenhan v. United States*, 438 F.2d 739 (6th Cir. 1971), and one of the district court cases, *Suhomlin v. United States*, 345 F.Supp. 650 (D. Md. 1972), each held that the government was not entitled to forfeiture, given that it had dropped the criminal charges upon which the initial seizure has been made. Thus neither examined the status of the property interest of an innocent party when the possessor of the property seized

is in fact guilty of a criminal violation supporting forfeiture. The remaining district court decision, *United States v. One 1971 Ford Truck*, 346 F.Supp. 613 (C.D. Calif. 1972), does proclaim the principle sought to be supported, but only in dictum: the court held that the possessor of the truck was unlawfully in possession of it when apprehended and so, under a statutory exception, the innocent owner's interest could not be forfeited. *Id.* at 619-20. This same exception is judicially recognized in Puerto Rico. *Ochoteco v. Superior Court*, 88 D.P.R. 517, 88 P.R.R. 500 (1963). However, the unlawful possession involved in *One 1971 Ford Truck* is fundamentally different from the Lessee's contractual-consensual possession of the yacht in this case.

This Court has rejected in a long line of cases the principle announced by the court below. *Goldsmith Jr.-Grant Co. v. United States*, 254 U.S. 505 (1921); *Dobbin's Distillery v. United States*, 96 U.S. 395 (1878); *The Palmyra*, 25 U.S. (12 Wreat.) 1 (1827). On the strength of a single district court's dicta the court below believes that *Coin and Currency* overruled these cases. At least two circuit courts of appeal disagree flatly. *United States v. One 1971 Buick Riviera*, 463 F.2d 1168 (5th Cir. 1972); *United States v. One 1967 Ford Mustang*, 457 F.2d 931 (9th Cir. 1972). The latter makes the obvious point that such a decision should be made only by this Court or by the appropriate legislature. *Id.* at 932.

The desirability of the result reached by the district court is by no means self-evident. Of course it would be unjust for an owner to lose his vehicle as a result of a crime committed by one who has stolen it, because the owner bears no causal responsibility for the crime, did not in any way consent to the risk of its occurrence,

and cannot be made the medium of any deterrence of future occurrences by the imposition of a forfeiture upon him. No American jurisdiction permits forfeiture in these circumstances. But the owner who consents to the possession and use of his property by another presents a different case. He is a physical cause of the use of that property in a subsequent violation of law by the possessor. He is in a position to know of the risk, to discourage the possessor from committing the crime, and to protect himself against loss.⁶

In one of the decisions which the court below thinks has been overruled, this Court said that in enacting a forfeiture statute a legislature "interposes the care and responsibility of the owner of property which may be used to facilitate violations of law in aid of the prohibitions of the law and its punitive provisions. . . ." *Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921). It is entirely consistent to interpose the owner's responsibility when he has consented to use of the property by another and to refuse to do so when use by another was against his will. Certainly it is a matter of the "severity of punishment," "its efficacy or its futility," matters which this Court has said to be "peculiarly questions of legislative policy." *Gore v. United States*, 357 U.S. 386, 393 (1958). Thus, the Commonwealth legislature should be entitled to make the policy determination that provision to law enforcement agencies of the power to seize and forfeit property (or property interests) of persons situated similarly to Pearson is necessary, or at least useful and convenient, to the conduct of vital government business.

⁶ Pearson is a paradigm example. See lease clauses 4(a), 4(c), 6. *Jrsd. Stat.*, App. C, pp. 43, 44, 45.

If Allowance of the "Innocent Owner" Defense Against Forfeiture is Constitutionally Required, the District Court Nevertheless Erred in Construing the Puerto Rican Statutes as Denying Such Defense.

C. But if justice today insists on allowing the innocent third party defense against forfeiture, in the form sought by Pearson, this can and should be done short of striking down the Puerto Rican statutes as unconstitutional. There are already two standard exceptions to the long-standing rule that innocence will not save a third party's interest in the seized object, one exempting property used as a common carrier unless the owner or person in charge is a consenting party to the violation, the other exempting conveyances unlawfully in the possession of one other than the owner. *See, e.g.*, 21 U.S.C. §881(a), subparagraphs (A) and (B). In Puerto Rico these exceptions exist, as the district court remarked, *by virtue of judicial recognition*. Jrtd. Stat., App. A., p. 24, n. 12: *Metro Taxi Cabs, Inc. v. Treasurer*, 73 D.P.R. 171, 73 P.R.R. 164 (1952), and *Ochoteco v. Superior Court*, 88 D.P.R. 517, 88 P.R.R. 500 (1963).

The district court emphasized that the irrelevance to proceedings under Puerto Rican forfeiture statutes of the owner's innocence is "solely as a result of their interpretation by the Supreme Court of the Commonwealth of Puerto Rico." Jrtd. Stat., App. A, p. 24. The court continued:

We cannot in fairness say that the result is the fault of the Supreme Court of the Commonwealth of Puerto Rico, for it, like many other courts, state and federal, was merely following the construction given the federal forfeiture statutes by the Supreme Court of the United States [before *Coin and Currency*]. *Ibid.*

The court below was, moreover, confident "that the Supreme Court of the Commonwealth of Puerto Rico

would have reached the same result as we do here today, in view of the fact that it has followed federal decisions in interpreting local forfeiture statutes." Jrtd. Stat., App. A, p. 21. But if the Puerto Rican Supreme Court were going to reach this result, it is doubtful that it would have done so by declaring the statutes unconstitutional. It is far more likely that the Puerto Rican Supreme Court would have recognized the innocence defense as a gloss on the statutes, just as it did with the other two innocence exceptions. *Metro Taxi Cabs, Inc. v. Treasurer, supra*; *Ochoteco v. Superior Court, supra*. Recently, the Arizona Supreme Court construed the Arizona vehicle forfeiture statute to permit proof of the owner's innocence of the crime, related to seizure, to defeat forfeiture of his property. *Re One 1965 Ford Mustang*, 105 Ariz. 293, 463 P.2d 827 (1970). This result was reached even though the court had no similar Arizona precedents for its interpretation.

The district court below plainly erred when it said "there is no conceivable way in which the Commonwealth courts can construe the challenged statutes 'to avoid the constitutional issues raised in this case.'" Jrtd. Stat., App. A, p. 21.

This Court has said:

The cardinal principle of statutory construction is to save and not to destroy. * * * as between two possible interpretations of a statute, by one of which it would be unconstitutional and the other valid, our plain duty is to adopt that which saves the act. Even to avoid a serious doubt the rule is the same. (*N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 130 (1936).)

In this case this principle should apply with special force, since the federal court elected not to abstain to

allow the Puerto Rican Supreme Court to construe and pass first on the constitutionality of local statutes.⁷ *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Bonet v. Texas Co.*, 308 U.S. 463, 471 (1940).

**The District Court Erred in Holding
Pearson had not Received Just Compensation
for its Interest in the Seized Property.**

D. Following its conclusion that the mechanics of the forfeiture statute of necessity would deprive Pearson of its property without just compensation, the court held Pearson "is entitled to be paid the amount of the appraisal, plus interest." Jrstd. Stat., App. A., p. 30. The district court cannot be basing its determination on what it would take to *justly* compensate Pearson. Despite the stipulation that Pearson was the "lawful owner" of the yacht and that it was and had been since its seizure in the possession of Commonwealth agents, there, nevertheless, is no evidence that Pearson suffered an injury for which compensation mandatorily should be held due. Clause 4(a) of the lease, which Pearson incorporated in its complaint, R. 8, 10, required Lessee to furnish Lessor with insurance policies with loss payable to Lessor "insuring Lessor against damage, loss, or destruction of the Equipment under this lease sustained in any manner whatsoever in an amount not less than the replacement value of said Equipment." Jrstd. Stat., App. C., p.

⁷ Faithful adherence to the principle of preservative construction is indispensable to support that narrow limitation of the doctrine of abstention which this Court, on the grounds of duplication of effort and expense, has insisted upon. *England v. Bd. of Medical Examiners*, 375 U.S. 411 (1964). If state (or Commonwealth) officials cannot confidently expect adherence to this principle, they are remiss in their duties when they cooperate, as the Commonwealth did, in facilitating federal consideration of the constitutionality of local statutes.

43. The record contains no pleading, much less any evidence, and there is no reason to assume, that this insurance does not exist or did not fully compensate Pearson.

In addition, clause 4(c) provides that "the damage, destruction, loss, disability or *forfeiture* of said Equipment shall not discharge or diminish the obligation of Lessee to pay rent as provided in this agreement." Jrso. Stat., App. C, p. 44. The agreement provided rental payments of \$474.66 per month, which over the full lease term comes to considerably more than the "unit price" specified by Pearson—obviously reflecting an interest factor. Jrso. Stat., App. C, P. 52. This sum became due no later than October 19, 1972, under clause 7, Jrso. Stat., App. C, p. 45, thus "entitling" Pearson to an action in debt for that amount. This cause of action is the compensation properly envisaged by the lease in the event of forfeiture, and Pearson should be held to it.

If Pearson is entitled here to compensation, how could the case of any mortgagor, conditional vendor or other security interest holder be distinguished? If their interests are entitled to recognition and protection under the "just compensation" standard, the state's ability to obtain forfeiture of the property of those "significantly involved in a criminal enterprise" will be seriously undermined. It is common knowledge that a large percentage of all vessels, vehicles and airplanes in use today are subject to outstanding security interests held by third parties.

Finally, if Pearson is now badly placed to seek from Puerto Rico courts the relief it believes itself guaranteed by the federal Constitution, this is doubly due to its own negligence. Pearson knew—insisted on knowing—that the yacht would be based in Puerto Rico,

clauses 9, 12, Jrstd. Stat., App. C, pp, 47-48, but failed to register with Puerto Rico authorities the ownership interest which it claims, contrary to 23 L.P.R.A. § 451c. A mortgagee who fails to record his interest loses it to a good faith purchaser; Pearson deserves no greater protection when it fails to comply with a state's police measures. Pearson knew by October 19, 1972, that the yacht had been seized, but failed to act within the time provided by Puerto Rican law. This case should present no occasion to reward inattention to local law.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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November 16, 1973

APPENDIX I

Statutes Involved

Section 512 of the Controlled Substances Act of Puerto Rico, 24 L.P.R.A. §2512 (Supp. 1973) provides in pertinent part:

(a) The following shall be subject to forfeiture to the Commonwealth of Puerto Rico:

(c) All conveyances, including aircraft, vehicles, mount or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in clauses (1) and (2) of this subsection;

(b) Any property seized under clause (4) of subsection (c) shall be seized by process issued pursuant to Act No. 23, of June 4, 1930, as amended, known as the Uniform Vehicle, Mount Vessel and Plane Seizure Act sections 1721 and 1722 of Title 34.

APPENDIX

Section 2 of the Uniform Vehicle, Mount, Vessel and Plane Seizure Act, 34 L.P.R.A. §1722, provides in pertinent part:

Whenever any vehicle, mount, or other vessel or plane is seized pursuant to the provisions of Act No. 6 of June 30, 1936, Act No. 220 of May 13, 1948, Act No. 42 of January 19, 1954, Act No. 45 of June 18, 1959 and/or Act No. 2 of January 20, 1956, such seizure shall be conducted as follows:

(a) The proceedings shall be begun by the seizure of the property by the Secretary of Justice, the Secretary of the Treasury or the Police Superintendent, through their delegates, policemen or other peace off-

clauses 9, 12, Jred. Stat., App. C, pp. 47-48, but failed to register with Puerto Rico authorities the ownership interest which it claims, contrary to 23 L.P.R.A. § 451c. A mortgagee who fails to record his interest loses it to a good faith purchaser; Pearson deserves no greater protection when it fails to comply with a state's police measures. Pearson knew by October 19, 1972, that the yacht had been seized, but failed to act within the time provided by Puerto Rican law. This case should present no occasion to reward inattention to local law.

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(b) Any property subject to forfeiture under clause (4) of subsection (a) of this section shall be seized by process issued pursuant to Act No. 39, of June 4, 1960, as amended, known as the Uniform Vehicle, Mount Vessel and Plane Seizure Act sections 1721 and 1722 of Title 34.

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(a) The proceedings shall be begun by the seizure of the property by the Secretary of Justice, the Secretary of the Treasury or the Police Superintendent, through their delegates, policemen or other peace offi-

cers. The officer under whose authority the action is taken shall serve notice on the owner of the property seized or the person in charge thereof or any person having any known right or interested [sic] therein, of the seizure and of the properties so seized, said notice to be served in an authentic manner, within ten (10) days following such seizure and such notice shall be understood to have been served upon the mailing thereof with return receipt requested. The owners, persons in charge, and other persons having a known interest in the property so seized may challenge the confiscation within the fifteen (15) days following the service of the notice on them, through a complaint against the officer under whose authority the confiscation has been made, on whom notice shall be served, and which complaint shall be filed in the Part of the Superior Court corresponding to the place where the seizure was made and shall be heard without subjection to docket. All questions that may arise shall be decided and all other proceedings shall be conducted as in an ordinary civil action. Against the judgment entered no remedy shall lie other than a certiorari before the Supreme Court, limited to issues of law. The filing of such complaint within the period herein established shall be considered a jurisdictional prerequisite for the availing of the action herein authorized.

(b) Every vehicle, mount, or any vessel or plane so seized shall be appraised as soon as taken possession of by the officer under whose authority the seizure took place, or by his delegate, with the exception of motor vehicles, which shall be placed under the custody of the Office of Transportation of the Commonwealth of Puerto Rico, which shall appraise same immediately upon receipt thereof.

In the event of a judicial challenge of the seizure, the court shall, upon request of the plaintiff and after

hearing the parties, determine the reasonableness of the appraisal as an incident of the challenge.

Within ten (10) days after the filing of the challenge, the plaintiff shall have the right to give bond in favor of the Commonwealth of Puerto Rico before the pertinent court's clerk to the satisfaction of the court, for the amount of the assessed value of the seized property, which bond may be in legal tender, by certified check, hypothecary debentures, or by insurance companies. Upon the acceptance of the bond, the court shall direct that the property be returned to the owner thereof. In such case, the provisions of the following paragraphs (c), (d) and (e) shall not apply.

When bond is accepted the subsequent substitution of the seized property in lieu of the bond shall not be permitted, said bond to answer for the seizure if the lawfulness of the latter is upheld, and the court shall provide in the resolution issued to that effect, for the summary forfeiture execution of said bond by the clerk of the court and for the covering of such bond into the general funds of the Government of Puerto Rico in case it may be in legal tender or by certified check; the hypothecary debentures or debentures of insurance companies shall be transmitted by the pertinent clerk of the court to the Secretary of Justice for execution.

(c) After fifteen (15) days have elapsed since service of notice of the seizure without the person or persons with interest in the property seized have filed the corresponding challenge, or after twenty-five (25) days have elapsed since service of notice of the seizure without the court's having directed that the seized property be returned on account of the bond to that effect having been given, the officer under whose authority the seizure took place, the delegate thereof, or the Office of Transportation, as the case may be, may pro-

vide for the sale at auction of the seized property, or may set the same aside for official use of the Government of Puerto Rico. In case the seized property cannot be sold at auction or set aside for official use of the Government, the property may be destroyed by the officer in charge, setting forth in a minute which he shall draw up for the purpose, the description of the property, the reasons for its destruction and the date and place where it is destroyed, and he shall serve notice with a copy thereof on the Secretary of Justice.

(d) In case the vehicle, mount, or vessel or plane is sold at auction, the proceeds from the sale shall be covered into the general fund of the Government of Puerto Rico, after deducting and reimbursing expenses incurred.

(e) If the seizure is judicially challenged and the court declares same illegal, the Secretary of the Treasury of Puerto Rico shall, upon presentation of a certified copy of the final decision or judgment of the court, pay to the challenger the amount of the appraisal of the proceeds from the public auction sale of such property, whichever sum is the highest, plus interest thereon at the rate of 6% per annum, counting from the date of the seizure.

Sections 1, 3, and 4 of the Act of June 14, 1965, 23 L.P.R.A. § 451, 451b, 451c, provide in pertinent part:

§ 451. As used in this chapter, unless the context clearly implies a different meaning:

(e) "Owner" means a person other than a lien holder, having the property in or title to a motorboat. The term includes a person entitled to the use or possession of a motorboat subject to an interest in another person, reserved or created by agreement and securing payment or performance of an obligation.

§ 451b. Every motorboat on the waters of the Commonwealth shall be numbered. No person shall operate or give permission for the operation of any motorboat on such waters unless the motorboat is numbered in accordance with this chapter, or in accordance with applicable federal law, or in accordance with a federally approved numbering system of another state, and unless (1) the certificate of number awarded to such motorboat is in full force and effect, and (2) the identifying number set forth in the certificate of number is displayed on each side of the bow of such motorboat.

§ 451c. (a) The owner of each motorboat requiring numbering by this Commonwealth shall file an application for number with the Authority.